

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE,

Plaintiff and Respondent,

v.

ROBERT DENNY,

Defendant and Appellant.

B214664

(Los Angeles County
Super. Ct. No. BA315306)

APPEAL from a judgment of the Superior Court of Los Angeles County.
Joseph A. Brandolino, Judge. Affirmed.

Linn Davis, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Susan D. Martynec and Robert C. Schneider, Deputy Attorneys General, for Plaintiff and Respondent.

The sole issue is whether the trial court failed to understand the scope of its discretion to strike one or more serious or violent felony convictions for purposes of sentencing under the Three Strikes law. We conclude the court did understand the scope of its discretion and therefore we affirm the judgment.

FACTS AND PROCEEDINGS BELOW

A jury convicted Robert Denny of attempting to rob a fellow customer of \$20 at the “X Spot No. 1” video store in Hollywood.¹ No weapon was used, no one was injured and the purported victim recovered his money and left the store, not waiting to talk to the police who had been summoned by the store manager. Denny, appearing in pro per, had rejected two plea bargains of 8 years, 8 months and 9 years respectively against the advice of his standby counsel. His attempted robbery conviction subjected Denny to a Three Strikes sentence of 25 years to life.

Prior to sentencing, Denny moved the court under Penal Code section 1385² and *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497 to exercise its discretion to strike at least two of his three prior serious or violent felony convictions for purposes of the Three Strikes law. The court denied the motion. Treating the attempted robbery as a felony, the trial court sentenced Denny to a prison term of 25 years to life under the Three Strikes law (§ 667, subds. (b)-(i)) plus three consecutive 5-year terms for three prior serious felony convictions (§ 667, subd. (a)(1), (e)). Denny will be 84 years old when he first becomes eligible for parole.

Denny argues on appeal that his sentence should be vacated and the case remanded for resentencing because the court failed to understand the scope of its discretion to strike his prior “strike” convictions. The court, he maintains, construed its discretion too narrowly by considering his criminal record to the exclusion of all other

¹ The jury also convicted Denny of two counts of misdemeanor resisting a peace officer and one count of misdemeanor possession of narcotics paraphernalia. The court sentenced him to 180 days in jail on each count to run concurrently with the sentence for attempted robbery.

² All statutory references are to the Penal Code.

relevant factors and construed its discretion too broadly by focusing on factors extrinsic to the Three Strikes sentencing scheme.

DISCUSSION

I. CONSIDERATION OF *WILLIAMS* AND *ROMERO* FACTORS

In *People v. Williams* (1998) 17 Cal.4th 148, 161, our Supreme Court explained that when deciding a motion to strike a “strike” under *Romero, supra*, the ultimate determination is whether “the defendant may be deemed outside the [Three Strikes] scheme’s spirit, in whole or in part.” In making that determination the court must accord “preponderant weight . . . to factors intrinsic to the scheme, such as the nature and circumstances of the defendant’s present felonies and prior serious and/or violent felony convictions, and the particulars of his background, character, and prospects.”

Denny admitted suffering two strike convictions for first degree burglary in 1985 and 1986 and a strike conviction for second degree robbery in 1997. He also admitted a conviction for second degree burglary in 1997, five convictions for petty theft in 1989, 1990, 1993 and 1997, two convictions for possession of cocaine in 1989, a conviction for receipt of stolen property in 1997 and a conviction for transportation of a controlled substance in 2005. Denny was on parole for the latter conviction when he suffered the current robbery conviction. The probation report noted that in addition to the convictions Denny admitted at trial Denny had one felony conviction and numerous misdemeanor convictions in Ohio between 1974 and 1984. The court took these convictions into consideration in ruling on Denny’s *Romero* motion. Denny argues the court erred because his criminal history was the *only* relevant factor the court considered in ruling on his motion. He contends that under *Williams, supra*, the court should have considered “the nature and circumstances” of his current felony and “the particulars of his background, character and prospects.” (17 Cal.4th at p. 161.)

The record does not support Denny’s claim that the court failed to consider the factors listed in *Williams* and *Romero, supra*, in determining whether to strike some or all of Denny’s prior serious or violent felonies. A trial court is presumed to have considered

all relevant factors in the absence of an affirmative record to the contrary. (*People v. Myers* (1999) 69 Cal.App.4th 305, 310.) The record here contains no affirmative indication that the trial court failed to consider all relevant factors before it denied the *Romero* motion. Conversely, the record shows that the trial court told Denny's counsel during the discussion of the *Romero* motion: "I have already read your moving papers. You have advocated well for Mr. Denny, as far as in the moving papers. You made the best argument you can."

Denny specifically complains that in ruling on his motion the court failed to consider the nature and circumstances of his current conviction for attempted robbery. On the contrary, the court identified the trifling nature of the current crime as the one factor that worked in Denny's favor. The court stated: "Frankly, I think a 40-year life sentence is excessive given the conduct in this case. It [is] incredibly excessive." The court also stated, however, "I cannot strike strikes based on the fact . . . that I believe [in] this case, the punishment doesn't fit the [current] crime, which is what I believe." The court correctly understood that it could not strike Denny's prior convictions solely because a sentence of 40 years to life was disproportionate to the current offense. (*Ewing v. California* (2003) 538 U.S. 11, 29-30 [indeterminate life sentences under the Three Strikes Law are justified by "the State's public safety interest in incapacitating and deterring recidivist felons"]; *People v. Romero, supra*, 13 Cal.4th at p. 531 ["Nor would a court act properly if 'guided solely by a personal antipathy for the effect that the three strikes law would have on [a] defendant . . .'].") The express purpose of the Three Strikes law is "to ensure longer prison sentences and greater punishment for those who commit a felony and have been previously convicted of serious and/or violent felony offenses." (§ 667, subd. (b).) "[L]onger sentences for career criminals who commit at least one serious or violent felony certainly goes to the heart of the statute's purpose—or spirit." (*People v. Strong* (2001) 87 Cal.App.4th 328, 338.)

We also reject Denny's claim that in determining his motion the court erred by not giving preponderant weight to the disparity between the nature of his offense and the

harshness of his sentence. Denny argues that in determining whether to strike his prior convictions the relationship between the seriousness of his current offense and his Three Strikes sentence “is the overarching consideration because the underlying purpose of striking prior conviction allegations is the avoidance of unjust sentences.” (Quoting *People v. Garcia* (1999) 20 Cal.4th 490, 500.) Denny misunderstands *Garcia* and quotes it out of context. The issue in *Garcia* was whether, in a Three Strikes case, the trial court may strike the prior conviction allegations as to one count, but not as to another. The Supreme Court held that the trial court may exercise its discretion in this way. The court reached this conclusion because “[a] trial judge, applying the factors we enumerated in *Romero* and *Williams*[, *supra*], may find adequate justification for striking one or more prior conviction allegations, but may deem appropriate the sentence that results from striking the prior conviction allegations as to only some counts.” (*People v. Garcia*, *supra*, 20 Cal.4th at p. 500.) Denying the trial court this flexibility, the high court reasoned, could “result in an unjust sentence” and “the underlying purpose of striking prior conviction allegations is the avoidance of unjust sentences.” (*Ibid.*) Nothing in *Garcia* suggests that a comparison of the nature or facts of the current felony to the sentence called for under the Three Strikes law should predominate over other factors enumerated in *Romero* and *Williams*, *supra*, in determining whether to strike prior “strike” convictions. Conversely, in *People v. Carmony* (2004) 33 Cal.4th 367, 379, the Supreme Court held that it is reversible error for a court to strike a prior conviction by focusing “on a single factor—the nature and circumstances of [the] current offense—to the exclusion of all others.”

II. CONSIDERATION OF EXTRINSIC FACTORS

Our high court has held that in determining a *Romero* motion “no weight whatsoever may be given to factors extrinsic to the” Three Strikes scheme. (*People v. Williams*, *supra*, 17 Cal.4th at p. 161.) Denny argues that the trial court violated this stricture by considering his rejection of the People’s plea offers and whether its decision

would be reversed on appeal if it struck two of Denny's strikes. Neither argument has merit.

In support of his contention that the trial court denied his *Romero* motion to punish him for rejecting the People's plea bargains Denny cites the court's observation that "unfortunately, he didn't take the advice of his lawyer [to accept the plea offers]. [¶] . . . Mr. Denny rolled the dice and lost big time." The court's statement merely reflected the way things turned out in this case—a statement of historical fact, nothing more. We find no basis for drawing an inference that because the court was willing to accept a plea bargain of 8 or 9 years prior to conviction its imposition of a Three Strikes sentence after conviction was intended to punish the defendant for not accepting the proffered sentence.

Denny's second contention—that the court was concerned about being reversed on appeal if it struck two of his strikes—is equally lacking in foundation. Denny relies on the court's comment that its decision would be "overturned" if it struck the strikes solely because it believed the sentence called for by the Three Strikes law was too severe a punishment "for actually what happened in this particular case." There is nothing wrong with a trial court being concerned with following the law as articulated by the Supreme Court. Indeed, the trial court is bound to follow such rulings. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)

In summary, we concur with the trial court that upon considering all the factors identified in *Romero* and *Williams* there is nothing about Denny's circumstances that would lead one to believe that he falls "outside the [Three Strikes] scheme's spirit, in whole or part." (*People v. Williams, supra*, 17 Cal.4th at p. 161.) Denny is precisely the type of "“revolving door” career criminal to whom the Three Strikes law is addressed.”” [Citation.] (*People v. Carmony, supra*, 33 Cal.4th at p. 379.)

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED.

ROTHSCHILD, Acting P. J.

We concur:

CHANEY, J.

JOHNSON, J.